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Not All Prosecutions are Created Equal: Less counting prosecutions, more making prosecutions count

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Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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Some prosecutions of human trafficking crimes are a waste of time and money. The trick is to make them count. Those who assert that prosecution wastes resources that are better spent elsewhere would generally divert them into protection and prevention efforts, namely the other ‘Ps’ in the ‘three P’ distillation of that neat trio of answers to questions of trafficking. But allowing traffickers to remain at large fails to prevent trafficking and inadequately protects victims. Prosecution, protection and prevention are not mutually exclusive. The question is not which of them should take priority, but how they can be pursued in a way that is mutually reinforcing.

In the myopic pro-prosecution camp are those who equate more prosecutions with greater success against trafficking. Those familiar with the United States Department of State *Trafficking in Persons Report* know that its tier ranking has attracted ire. Its methodology includes an assessment of ‘implementation of human trafficking laws through vigorous prosecution of the prevalent forms of trafficking in the country and sentencing of offenders’.¹ But quantitative measures of prosecution and conviction rates make simple what is necessarily complex, and compare what is essentially incomparable. What does it mean or instance, that there are few trafficking prosecutions in a country where even murder goes largely unpursued? In a country where there are several prosecutions for trafficking, how can we know whether those convictions served to disrupt trafficking operations? Did trial processes respect the rights of the parties involved? Did convictions lead to compensation and restitution for victims, or are they now worse off? In assessing trafficking response, prosecutions “warts and all” can only offer quantitative insight.²

Those adverse to prosecution raise valid concerns. Victim participation in criminal justice processes can result in their re-victimisation where victim-centred approaches are lacking.³ In worst-case scenarios, victims’ protection needs may escalate as a result of their participation in trial processes, with little discernible benefit for them. Heavy reliance on victim testimony means that cases can fall apart, and can often mean that only low level criminals who victims come into contact with see the inside of a court room.⁴ Indeed, prosecutions achieve little towards protection or prevention where the best scenario is a successful conviction of replaceable components in a large and complex exploitation machine. These concerns underscore the need to weigh protection and prevention gains in setting prosecutorial priorities.

From a prevention perspective, already stretched prosecutorial resources should be allocated to where they can do the most damage to trafficking ventures. In practice, where convictions for offences under complex domestic trafficking laws would not succeed, prosecutors may elect to pursue alternative prosecutorial paths.⁵ A successful conviction for kidnapping, extortion, rape, assault, battery and organised crime may result in incarceration for 20 odd years. The prosecutor here is to be commended for her calculated decision to minimise risks to the outcome of the trial and to victims themselves, while still succeeding to disrupt the trafficking network by putting a key player out of play. Yet this conviction would not count as a ‘success’ in criminal justice response to human trafficking, while a conviction of a petty criminal for a crime that is sloppily branded as trafficking would. This injustice speaks to the need to do more than simplistically count prosecutions and categorise them by the forms of exploitation they confront; indeed, pressuring countries to do so may even be detrimental.

¹ United States Department of State, *Trafficking in Persons Report 2014*, USDOS, 2015, p. 40, retrieved 6 May 2015, <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>

² *Global Report on Trafficking in Persons 2014*, UNODC, 2014, p. 18.

³ E Pearson, *Human Traffic Human Rights: Redefining victim protection*, Anti-Slavery International, London, 2002, pp. 50–53.

⁴ K Kangaspunta, ‘Was Trafficking in Persons Really Criminalised?’ *Anti-Trafficking Review*, issue 4, 2015, pp. 80–97, www.antitraffickingreview.org

⁵ See, for example: United Kingdom Crown Prosecution Services, *CPS Policy for Prosecuting Cases of Human Trafficking*, CPS, 2011, p. 12 and *Code for Crown Prosecutors*, CPS, 2013, p. 13.

From a protection point of view that puts victims' needs front and centre, access to justice must be upheld as a key component of a holistic response. Decisions to involve victims in prosecutions of their traffickers must be weighed against the risks posed to their safety and wellbeing, and to the trial outcome. In some cases, the more appropriate course from a victim's best interests perspective is to simply not prosecute traffickers. Such decisions should not be chalked up as prosecutorial failures but as protection successes. In other cases, doing what is in the best interests of the victim may mean empowering him or her to participate in the criminal justice process against traffickers.

Prosecution of human trafficking is costly and requires resources that could be invested elsewhere. This is true for all prosecutions of complex crimes, but should not lead to the conclusion that we need not bother. To abandon the attempt to end impunity for traffickers is to disregard one of the key *raison d'être* of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, being to protect victims in legal proceedings against traffickers.⁶ Luis CdeBaca, US Ambassador-at-Large to Monitor and Combat Trafficking in Persons, recalls a comment made by a victim on seeing the perpetrator at court: "He looks so small," she said.⁷ How can victims of trafficking triumph over traffickers unless they are supported to bring them to justice? In doing so, emphasis should not be on simply increasing the number of prosecutions counted as 'trafficking' prosecutions, but on making them count by measuring their value by the extent to which protection and prevention objectives are also served.

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⁶ Emphasis added, UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 6.

⁷ United States Department of State, p. 3.